Prepared Statement of the Federal Trade Commission

FTC Merger Enforcement in the Gasoline Industry

Presented by Chairman Robert Pitofsky

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Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism
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I. Introduction

Mr. Chairman and members of the Committee, I am Robert Pitofsky, Chairman of the Federal Trade Commission.[(1)] I am pleased to appear before you today to present the Commission's testimony concerning the important topic of competition in the gasoline industry in West Coast markets. Competition in the energy sector - particularly in the petroleum industry - is vitally important to the health of the economy of the United States, and to the various regions of the country. Our experience has taught us that gasoline markets can be much narrower than the entire country, and the West Coast markets have their own particular features that set them apart from the rest of the country. In all markets, antitrust enforcement has an important role to play in ensuring that the gasoline industry is, and remains, competitive. Merger enforcement in particular has recently been at the forefront of efforts to maintain and protect a competitive environment in various gasoline markets, and our testimony today is directed at that ongoing effort.

The FTC is a law enforcement agency with two distinct but related missions: preserve competition in the marketplace through antitrust law enforcement and protect the consumer from unfair or deceptive acts or practices. The Commission's statutory authority covers a broad spectrum of sectors in the American economy, including the companies that comprise the energy industry and its various components. Among the statutes the Commission enforces are two antitrust laws, the FTC Act[(2)] and the Clayton Act.[(3)] The Commission shares jurisdiction with the Department of Justice under section 7 of the Clayton Act, which prohibits mergers or acquisitions that may "substantially lessen competition or tend to create a monopoly."[(4)] Under section 5 of the FTC Act, the Commission prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."

II. Level of Merger Activity

It is no secret that merger activity in the United States is at an all-time high. The number of mergers reported to the FTC and the Justice Department pursuant to the Hart-Scott-Rodino Act has more than tripled over the past decade, from 1,529 transactions in fiscal year 1991 to 4,926 transactions in fiscal 2000. Although filings have declined so far this year because of higher

The Commission approaches its antitrust mission by examining the areas in which merging companies compete, looking at the existing state of competition in that marketplace and the likely changes in that marketplace in the future, both from new competition entering and from existing competition exiting. We also look at the effect of recent mergers on competition in the particular marketplaces at issue, and whether the merger is a part of a trend towards concentration that limits competition.[(8)] The Commission has recognized the existence of such a trend toward consolidation in the petroleum industry.[(9)]

On the other hand, many mergers actually increase competition. So, the Commission also considers efficiencies in deciding whether to challenge an otherwise anticompetitive merger because they may counteract the merger's threatened anticompetitive effects. However, the Commission engages in a rigorous analysis of efficiencies. Merely claiming cost savings is not enough to allow an anticompetitive merger; they must be proven. The Commission demands that cost savings of the merger be real and substantial; they cannot result from reductions in output; they cannot be practicably achievable by the companies independent of the merger; and they must counteract the merger's anticompetitive effect, not merely flow to the shareholders' bottom line.[(10)]

Protecting competition and consumers is the goal of antitrust enforcement across all industries; its importance is particularly clear in the energy industry, where price increases can have a direct and lasting impact on the entire economy. Towards that end, the Commission has expended a substantial part of its resources in recent years in addressing the wave of consolidation in the petroleum and gasoline industry. In fiscal years 1999 and 2000, the Bureau of Competition spent almost one-third of its total enforcement budget on investigations in energy industries, and that level of effort has continued into 2001. Our merger review investigations revealed that several of these transactions threatened competition in local or regional markets. In those instances, the Commission allowed the merger only after demanding significant changes that would fully restore the competition lost as a result of the merger.

The Commission's investigation of the merger between Exxon and Mobil highlights many of the issues, and difficulties, in large oil company mergers. After an extensive review, the Commission required the largest retail divestiture in FTC history - the sale or assignment of 2,431 Exxon and Mobil gas stations in the Northeast and Mid-Atlantic regions, and in California, Texas and Guam.[(11)] The Commission also ordered the divestiture of Exxon's Benicia refinery in California; light petroleum terminals in Boston, Massachusetts, Manassas, Virginia, and Guam; a pipeline interest in the Southeast; Mobil's interest in the Trans-Alaska Pipeline; Exxon's jet turbine oil business; and a volume of paraffinic lubricant base oil equivalent to Mobil's production. The Commission coordinated its investigation with the Attorneys General of several states and with the European Commission (about 60% of the merged firm's assets are located outside the United States).

There are several particularly noteworthy aspects of the Exxon/Mobil settlement. First, the divestiture requirements eliminated all of the overlaps in areas in which the Commission had evidence of competitive concerns. Second, while several different purchasers ended up buying divested assets, each purchased a major group of assets constituting a business unit. This replicated, as nearly as possible, the scale of operations and competitive incentives that were present for each of these asset groups prior to the merger. Third, these divestitures, while extensive, represented a small part of the overall transaction. The majority of the transaction did not involve significant competitive overlaps. In sum, we were able to resolve the competitive

9. British Petroleum Company p.l.c., C-3868 (April 19, 1999) (consent order), Analysis to Aid Public Comment.

10. See United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4 (1992), reprinted in Trade Reg. Rep. (CCH) ¶ 13,104 (1992).

11. Exxon Corp., C-3907 (Nov. 30, 1999) (consent order).

12. British Petroleum Company p.l.c., C-3868 (April 19, 1999) (consent order).

13. Shell Oil Co., C-3803 (April 21, 1998) (consent order).

14. Federal Trade Commission v. BP Amoco PLC, Civ. Action No. C00 0420-SI (N.D. Cal. 2000).

15. More complex refineries are usually better able to substitute different types of crude oil in their production mix. The Puget Sound refineries that serve Oregon and Washington are less complex than others on the West Coast.

16. As Judge Posner has noted, "price discrimination implies market power, that is, the power to charge a price above cost . . . without losing so much business so fast to competitors that the price is unsustainable." In re Brand Name Prescription Drugs Antitrust Litigation, 186 F.3d 781, 786 (7th Cir 1999).

17. 15 U.S.C. § 18.